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95-1161

Supreme Court, U.S.
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NO._____.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1995

LEECO, INC. PETITIONER

v.

BILLY WAYNE BURNS; HON. LLOYD R. EDENS, Administrative Law Judge; and WORKERS' COMPENSATION BOARD RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

PETITION FOR WRIT OF CERTIORARI AND APPENDICES

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QUESTION PRESENTED

Is a state workers' compensation law requiring coal mine operators to pay substantial, cash "retraining incentive benefits" to employees who are still working as coal miners, who have no physical or occupational disability, and whom the statute does not require to seek any retraining as a condition of their receiving such benefits, so arbitrary and irrational that it violates the Fourteenth Amendment to the United States Constitution?

PARTIES TO THE PROCEEDING BELOW

The parties to this proceeding were also parties to the proceedings in the Supreme Court of Kentucky. Leeco, Inc. is a corporation whose parent company is Transco Coal Company. The parent of Transco Coal Company is James River Coal Company. Leeco, Inc. has no subsidiaries.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

Petitioner, Leeco, Inc., respectfully prays that a Writ of Certiorari issue to review the decision of the Supreme Court of Kentucky entered on October 19, 1995.

OPINIONS BELOW

The opinion of the Supreme Court of Kentucky was designated by that court "Not to be Published" so it is unreported, but it is reprinted in Appendix A at pages A1-A4.

The Opinion of the Court of Appeals of Kentucky is not officially reported but it is reprinted in Appendix A at pages A5-A9. The Opinion of Kentucky Workers' Compensation Board is reprinted in Appendix A at pages A10-A11. The Opinion, Order and Award issued by Administrative Law Judge Edens is reprinted in Appendix A at pages A12-A15.

JURISDICTION

The opinion of the Supreme Court of Kentucky was entered on October 19, 1995. This Petition is filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a). Pursuant to United States Supreme Court Rule 14.1(e)(v), Petitioner states that although an agency and an employee of the Commonwealth of Kentucky are parties herein, their interests may not be such that they would be inclined to respond on behalf of the state; and, therefore, 28 U.S.C. §2403(b) may be applicable and Petitioner has served this petition on the Attorney General of Kentucky.

STATUTORY AND CONSTITUTIONAL PROVISIONS

Kentucky Revised Statute §342.732, as it existed at the time the original proceedings herein were initiated (said statute having been amended thereafter, as will be discussed herein), is reproduced in its entirety in Appendix B at pages B1-B4.

The Fourteenth Amendment to the Constitution provides in relevant part:

> [N]o state shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

In 1987, the Kentucky legislature enacted numerous amendments to the Kentucky Workers' Compensation Act, Ky. Rev. Stat. Chapter 342. Among these was a new section of the Act, Ky. Rev. Stat. §342.732, which included a new type of benefit, called a "retraining incentive benefit," available to coal miners who were found to have the earliest stage of coal workers' pneumoconiosis discernable on a chest X-ray film. This new benefit could be collected by a miner from his employer even as the miner continued to work and receive wages, without any showing that the miner had suffered any adverse effects of the disease. The legislature simultaneously amended Ky. Rev. Stat. §342.197, the "antidiscrimination" provision of the Act, by adding a new subsection prohibiting coal mine operators from refusing to hire, discharging, or taking any action at all towards a miner because of the miner's having contracted the early stage of pneumoconiosis. Aside from its use of the term "retraining incentive benefits," the legislature provided no indication of its intention as to the purpose of those benefits, except, of course, the intention that a substantial amount of money change hands.

Petitioner, Leeco, Inc., operates coal mines. Respondent, Billy Wayne Burns, is a miner who was and still is employed by Leeco. Burns filed an "Application for Adjustment of Claim" with the Kentucky Department of Workers' Claims on August 5, 1993, seeking to require Leeco to pay him "retraining incentive benefits." On the basis of evidence showing that Burns had an early stage of simple coal workers' pneumoconiosis and there being no evidence of pulmonary impairment, the administrative law judge issued an award. As is noted in the administrative law judge's Opinion, Order and Award (Appendix A at page A13), Leeco had presented to the ALJ the constitutional questions stated in this petition, but the ALJ deemed them "reserved" for appeal,

presumably because he did not have authority to decide them. (Appendix A at pages A12, A13).

Leeco sought review of the ALJ's decision by appeal to the Kentucky Workers' Compensation Board. Leeco argued that there was no rational basis for the statute under which Burns was granted his award and that, therefore, the statute and the award violated the Fourteenth Amendment to the United States Constitution as well as provisions of the Constitution of Kentucky. The Board, however, declared that "as an administrative agency, [it] has no jurisdiction to determine the constitutionality of the statute" and that "[s]uch a determination can only be made by a court of law;" so it affirmed the award. (Appendix A at pages A10-A11).

Leeco then filed a petition for review by the Kentucky Court of Appeals. The same issues were presented to the Court of Appeals but it, too, affirmed the award. The Court of Appeals declared that, in its opinion, the statute in question violates neither the state nor the Federal Constitution. (Appendix A at pages A5-A9). Leeco then appealed that decision to the Supreme Court of Kentucky but that court affirmed the lower court's decision. (Appendix A at pages A1-A4). As the matter now stands, if this Court does not grant the relief requested in the present petition, Leeco will be required to begin paying Burns a cash benefit at the rate of $147.90 per week and to continue paying this for a period of 208 weeks, even while Burns continues to work for Leeco and earn full wages as a coal miner.

COMPELLING REASONS FOR GRANTING THE WRIT

I. Introduction.

Under the authority of a Kentucky statute, Kentucky's Workers' Compensation Board and its appellate

courts have declared that Leeco, Inc. is required to pay several thousand dollars in workers' compensation benefits to an employee who has suffered no disability. In fact, the stage of coal workers' pneumoconiosis which Burns has contracted is one which, according to every authority, does not cause any respiratory impairment. Given that Burns is still employed in the occupation which allegedly gave rise to his disease, clearly he has no "occupational disability" within any definition of that term previously existing in the law.

The Kentucky General Assembly appears to have recognized that fact when it drafted the statute, because it declared that the type of benefit awarded to Burns was to be called a "retraining incentive benefit." The problem, however, is that under the statute the benefit is payable to the claimant in cash whether he undergoes any retraining or not. The predictable result of this has been that the benefit actually operates as disincentive for such claimants to seek retraining and pursue other occupations which would not expose them to coal dust; and this is so simply because such claimants can continue to work as coal miners (this being perhaps the highest-paid, unskilled occupation existing in Kentucky) while receiving the "retraining incentive benefit" which, under these circumstances, is nothing but a huge, cash bonus. That statutory scheme was roundly criticized from virtually every quarter, including Kentucky's courts, and the General Assembly finally amended the statute to provide an actual incentive for coal miners to retrain for other jobs; but that amendment took effect on April 4, 1994, too late to be applicable to this case and several hundred others which already had been adjudicated under the 1987 statute.

II. History of the Statute.

Coal workers' pneumoconiosis, or "black lung," is a subject which has given rise to much legislation and litigation

in Kentucky. The Kentucky Workers' Compensation Act, Ky. Rev. Stat. Chapter 342, has for many years treated "occupational diseases" as a special class of compensable "injuries." Coal workers' pneumoconiosis is unique among "occupational diseases" as to the immense volume of litigation and reported cases it has generated as well as the attention which has been focused upon it by the state legislature.

In addressing the issue presented here, it is necessary that there be an understanding of pneumoconiosis, itself, particularly an understanding of the attributes of the disease and the other factors which have given rise to legislation concerning it. One source of information on this topic is the opinion of this Court in Usery v. Turner Elkhorn Mining Company, 428 U.S.1 (1976). That decision addressed an attack on "certain aspects of Title IV of the Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 792, as amended by the Black Lung Benefits Act of 1972, 86 Stat. 150, 30 U.S.C. §901 et seq. (1970 ed. and Supp. IV)" based upon an assertion that the federal statute was unconstitutionally arbitrary and irrational. Id. at 5. In Usery, the Court observed that, while advanced or "complicated" pneumoconiosis can be accompanied by serious pulmonary impairment and a substantial risk of worsening, simple pneumoconiosis "is generally regarded by physicians as seldom productive of significant respiratory impairment." Id. at 7. The Court's acknowledgement of the distinction between "simple" and "complicated" pneumoconiosis apparently was an important factor in the Court's upholding the federal statute.

The Supreme Court of Kentucky also described the medical attributes of pneumoconiosis in connection with its upholding, against an attack by coal mine operators, a different provision of Ky. Rev. Stat. §342.732 than is at issue here. Kentucky Harlan Coal Company v. Holmes, 872 S.W.2d 446 (Ky. 1994). The court relied heavily upon a book published by former state senator H. Edward O'Daniel, Jr., titled 1987 Kentucky Workers' Compensation Law, wherein the Senator

undertook to describe the process by which the 1987 "reform" legislation was enacted. Senator O'Daniel's book provides insight which otherwise would be unavailable, since the Kentucky legislature does not publish records of its deliberations. According to Senator O'Daniel, the legislature had before it the following information:

> Pursuant to X-ray examination, pneumoconiosis is classified as simple or complicated depending on the size of the opacities present in the patient's lungs. The presence of opacities smaller than one centimeter in diameter indicates the presence of simple pneumoconiosis; whereas, the presence of opacities larger than one centimeter in diameter indicates the presence of complicated pneumoconiosis. Simple pneumoconiosis is subclassified by the number of opacities present as category 1, 2, or 3, with category 2 representing X-rays with a moderate number of opacities and category 3 representing X-rays with more opacities than are typical of simple pneumoconiosis. Simple pneumoconiosis, even if category 3, is not usually associated with any significant decrease in lung function; whereas, complicated pneumoconiosis, particularly in its more advanced forms, is often associated with severe clinical disease and moderate to severe pulmonary dysfunction. O'Daniel, supra, at 13-15.

Holmes, 872 S.W.2d at 449, 450. In short, simple pneumoconiosis (and the statute in question here concerns only the earliest stage, or "category 1," of simple pneumoconiosis) typically does not cause physical impairment. That point

having been stated, it is necessary that there be a discussion of the evolution of Kentucky law concerning pneumoconiosis.

Prior to the enactment of Ky. Rev. Stat. §342.732 in 1987, a coal miner who merely presented an X-ray examination showing that he had contracted the earliest stage of simple pneumoconiosis had a very good chance of obtaining an award based upon permanent, total occupational disability providing benefits at a rate in excess of $300.00 per week (the maximum rate being set in accordance with the year in which the claimant's "last exposure" to coal mining dust occurred) for the rest of his life. On the other hand, a miner could not be considered to have a compensable disability due to an occupational disease so long as he was continuously employed in the occupation which exposed him to the hazard giving rise to the disease. Bethlehem Mines v. Davis, 368 S.W.2d 176 (Ky. 1963); Stephens Elkhorn Coal Corp v. Tibbs, 374 S.W.2d 504 (Ky. 1964); Alva Coal Company v. Trosper, 375 S.W.2d 406 (Ky. 1964). The reason for this rule was stated as being "that so long as a man actually continues, despite an occupational disease, to satisfy the requirements of his work it can hardly be found that he cannot do it." Allen v. Commonwealth, Department of Highways, 425 S.W.2d 283, 284 (Ky. 1968). Thus, it appeared that, as a general rule, a coal miner seeking benefits for pneumoconiosis had to establish (a) that he was no longer working as a coal miner (for whatever reason) and (b) that he was afflicted with some stage of pneumoconiosis, if only the very earliest stage; and thereupon he was very likely to receive an award that would support him for the rest of his life. As was noted by the court in Holmes, the generosity of the prior system of compensation for pneumoconiosis had resulted in intolerable costs to employers and the "Special Fund," Kentucky's cost-spreading mechanism funded by assessments on employers and insurance carriers. This was the primary motivation for the legislature's changing the law in 1987. Holmes, 872 S.W.2d at 449, 450.

The most important change concerning pneumoconiosis was the addition of a new section of the Act, Ky. Rev. Stat. §342.732, which created a system for determining the amount of benefits awardable to a claimant with pneumoconiosis. The new statute (Appendix B to this petition) provided that benefits for permanent, total disability would only be awarded if the claimant demonstrated that he had pneumoconiosis with an X-ray classification of at least "2/1" (the earliest stage of "category 2," simple pneumoconiosis) or, if the claimant only had "category 1" pneumoconiosis, that it was accompanied by breathing impairment so severe that his "forced expiratory volume in one second" or his "forced vital capacity," as measured in a standard fashion, had fallen below 55% of the predicted values for a "normal" person of the claimant's sex, age and height. The statute provided that a claimant with "category 1" simple pneumoconiosis who did not qualify for the highest award could still receive benefits for permanent, partial disability if he showed that his "forced expiratory volume in one second" or his "forced vital capacity" had been reduced below 80% of the predicted value but not below 55%. All other claimants found to have "category 1" pneumoconiosis would be eligible to receive what the legislature called a "retraining incentive benefit." Liability for payment of the various "disability" benefits was apportioned between the last employer and the Special Fund as under prior law, but the "retraining incentive benefit" was to be paid entirely by the mine operator by whom the claimant was most recently employed when he applied for benefits.

As will be discussed further under a subsequent heading, the new statute was, in most respects, a benefit "schedule" much like the schedules used in previous versions of the Kentucky Act and still in use in other jurisdictions, with one exception: A miner eligible for "retraining incentive benefits" could collect them even as he continued to work as a coal miner. Clearly, the legislature recognized that these benefits

were to be awarded in the complete absence of "disability" as that term previously had been defined. The name "retraining incentive benefits" apparently was chosen simply to distinguish this type of benefit from all other kinds of awards available under Ky. Rev. Stat. §342.732 and the rest of the Workers' Compensation Act. The name itself, however, was the only indication of a connection between this kind of award and any goal of retraining the miner or removing him from the cause of his disease. In fact, the legislature simultaneously amended Ky. Rev. Stat. §342.197, the antidiscrimination section of the Act, to state:

> (2) It is unlawful practice for an employer:
>
> (a) To fail or refuse to hire, or to discharge any individual, or otherwise discriminate against an individual with respect to his compensation, terms, conditions or privileges of employment, because such individual has been diagnosed as having category 1/0, 1/1, or 1/2 occupational pneumoconiosis with no respiratory impairment resulting from exposure to coal dust; or
>
> (b) To limit, segregate or classify his employees in any way which would deprive or tend to deprive an individual of employment opportunities or otherwise adversely affect his status as an employee, because such individual has been diagnosed as having category 1/0, 1/1, or 1/2 occupational pneumoconiosis with no respiratory impairment resulting from exposure to coal dust.

Thus, far from expressing even a preference that eligible miners retrain for jobs other than coal mining, so as to avoid the risk

of the disease's worsening, the statute gave them an absolute right to continue working in that occupation. Of course, they would receive their full wages for as long as they wanted to work in the mines while also receiving an income benefit at a rate well over $100.00 per week.

The Holmes decision, previously discussed, arose from the assertion by an employer that the irrebuttable presumption of total disability created by Ky. Rev. Stat. §342.732(1)(d), for claimants demonstrating "category 2" pneumoconiosis, was unconstitutionally arbitrary and irrational. The issue presented here, concerning the retraining incentive benefits provision of the statute, was not presented in Holmes. The Kentucky court had occasion to analyze the retraining incentive benefit provision in an earlier case, however, and it stated:

> We note the apparent contradiction of purpose in a statutory scheme which, on the one hand, awards benefits to encourage workers with Category 1 coal workers' pneumoconiosis and no respiratory impairment to retrain in preparation for seeking employment outside the mining industry, but which, in fact, not only fails to require that those benefits be used for retraining but also penalizes a mine operator who refuses to hire such a worker. Such a scheme is incomprehensible to this Court. If the legislature truly intends to encourage these workers to seek other employment, we would urge them to enact legislation that would more effectively accomplish that purpose.

Eastern Coal Corp. v. Blankenship, 813 S.W.2 808, 810 (Ky. 1991). The constitutionality of the retraining incentive benefit statute, however, had not been called into question in that case, either.

Apparently in response to criticism like that contained in Blankenship, the Kentucky legislature changed Ky. Rev. Stat. §342.732(1)(a) with an amendment which became effective April 4, 1994, too late to be applicable in this case and thousands of others which already had been adjudicated. The new statute provides, in pertinent part:

> [Retraining incentive] benefits may be paid directly to the employee only if the employee is not working in the mining industry in the severance and processing of coal . . . . While the employee is working in the mining industry in the severance and processing of coal . . . and if the employee is enrolled and actively participating in a bona fide training or education program approved under administrative regulations to be promulgated by the commissioner, benefits awarded under this paragraph shall be paid directly to the institution conducting the training or education program on a semimonthly basis . . . . When the employee, through no fault of his own, is no longer working in the mining industry in the severance or processing of coal . . . then any remaining benefits shall be paid directly to the employee on the same monthly basis as provided in KRS 342.040.

Ky. Rev. Stat. §342.732 (Michie, 1994 Cum. Supp.). When that amendment took effect, there were several hundred cases pending before administrative law judges which had been filed prior to the effective date of the amendment; and employers advanced an argument that the amendment should be applied "retroactively" to those pending cases. (Again, that argument was not available in this case and many others which already

had advanced to the state's Court of Appeals or Supreme Court by then.) The Supreme Court of Kentucky finally addressed this argument in Thornsbury v. Aero Energy, 908 S.W.2d 109 (Ky. 1995), and ruled in favor of the employers. The court pointed out the absurdity of the previous retraining incentive benefit statute and the "remedial" nature of the 1994 amendment, this "remedial" quality being the court's justification for applying the new statute to cases which had not been adjudicated before its effective date. In particular, the court stated:

> We believe it plain that the legislature intended to reform the statute to live up to its name and actually provide retraining incentive benefits. There can be no question that prior to the amendment, the 208 week award rarely, if ever, served as an incentive to retrain coal workers. We have no doubt that the ALJ's reference to "bass boat benefits" and "pick-up truck benefits" is no exaggeration. Further proof lies in the statistics provided by the [Workers' Compensation] Board, namely, that 855 RIB claims were filed in March of 1994 alone, as compared to 948 RIB claims filed in all of 1991.

Id. at 111. The point of that last sentence in the quoted passage was that when coal miners and the plaintiff's bar learned of passage of the 1994 amendment, they hurriedly filed as many of their "RIB" claims as possible before April 4, 1994, the date on which the Governor was expected to (and ultimately did) sign the bill. In other words, the court understood that, given a choice, coal miners would rather have extra cash that they could spend on a "bass boat" or "pick-up truck" than a right to be trained for another occupation. Nevertheless, when the present case made its way to that court, it refused to find the

1987 statute so arbitrary and irrational as to violate the Constitution.

III. Citizens of the United States Have the Right to be Free From Economic Legislation Which is Arbitrary and Irrational.

Leeco appreciates the difficulty of the task before it in this case. See, e.g., U.S.v. Salerno, 481 U.S. 739, 745 (1987).; U. S. Department of Labor v. Triplett, 494 U.S. 715, 721 (1990) (describing the burden to be carried by the party advancing a due process challenge against a legislative act). In Salerno, the Court did, however, acknowledge the continued viability of a right to "substantive due process," preventing a legislature from engaging in conduct which "shocks the conscience," arising under the Constitution. 481 U.S. at 746 (citing Rochin v. California, 342 U. S. 165, 172 (1952)). The very existence of those decisions and others which will be cited herein implies that there exists somewhere a boundary between legislation which is at least arguably rational and that which is violative of the Federal Constitution because it is completely irrational and arbitrary. The Kentucky legislature crossed that line in enacting the statute challenged herein.

The Fourteenth Amendment places upon the governments of the states the same duty to observe the requirements of due process as is placed on the Federal Government by the Fifth Amendment. The right of citizens to due process inures to the benefit of business entities as well as individuals, and protects them from government actions resulting in the transfer of their assets to others without any rational basis or legitimate purpose. Railroad Retirement Board v. Alton Railroad Company, 295 U.S. 330 (1935) (Federal enactment requiring railroads to set aside pension funds for claimants, including former employees who were not

employed at the time of the enactment, held unconstitutionally arbitrary and irrational under the Fifth Amendment). In Usery v. Turner Elkhorn Mining Company, Justice Marshall, writing for the majority, suggested that Alton might not "retain[] vitality," pointing out that four Justices had "dissented from the Court's invalidating the Railroad Retirement Act altogether, but [had] agreed with the Court that the provision for allowances to former employees was arbitrary." Usery v. Turner Elkhorn Mining Company, 428 U.S. 1, 19 n.18 (1976) (citing Alton, 295 U.S. at 374, 389) (emphasis added). Kentucky's 1987 RIB statute is at least as irrational as the provisions of the Railroad Retirement Act which even the dissenters in Alton found unconstitutional.

The Kentucky Constitution contains a provision which is recognized as being the state's equivalent to the Federal Due Process Clauses. It states: "Absolute and arbitrary power over the lives, liberty and property of free men exists nowhere in a republic, not even in the largest majority." Ky. Const., §2; see generally, Kentucky Milk Marketing v. Kroger Company, 691 S.W.2d 883, 899 (Ky. 1985). Thus, whether or not the individual citizens of the United States possess a "liberty interest" in the freedom from abuse at the whim of the most powerful factions of a state legislature, the citizens of Kentucky certainly do possess such a right arising from this state's constitution. The state, having created that right, cannot then disregard it without running afoul of the Fourteenth Amendment. Hewitt v. Helms, 459 U.S. 460, 471-472 (1983) (held that a state statute's use of "explicit mandatory language" setting forth prerequisites for certain actions toward prison inmates "ha[d] created a protected liberty interest"), cited in Washington v. Harper, 494 U.S. 210, 221 (1990) (a state correctional institution's Policy regarding involuntary administration of psychotropic drugs having been challenged under the Due Process Clause; held that "the Policy itself undoubtedly confer[red] a right" in the nature of a protected

"liberty interest"). What the Kentucky legislature did here, in order to obtain passage of a beneficial bill, was to include in it provisions which were demanded by certain powerful factions but which served no legitimate purpose, and then attach to those provisions a label which, it was hoped, would make them appear less arbitrary. Such a ruse should not enable the legislature to avoid constitutional restraints.

Comparing the RIB statute to the Federal Act which was at issue in Usery is crucial to the determination in this case. In Usery, the challenged statute provided various means of establishing "total disability," and an irrebuttable presumption of total disability arising from a determination that the miner was afflicted by complicated pneumoconiosis with progressive massive fibrosis. 428 U.S. at 10, 11. The mine operators, seeking to have the statute declared invalid, pointed out that it provided "total disability" compensation for a class of claimants which might include individuals who could still work in nonmining jobs. The Court responded as follows:

> We think it patent that this attack on §402(f) must fail. A miner disabled under §402(f) standards has suffered in at least two ways: His health is impaired, and he has been rendered unable to perform the kind of work to which he has adapted himself. Whether these interferences merit compensation is a public policy matter left primarily to the determination of the legislature. [Citation omitted] We cannot say that they are so insignificant as not to be a rational basis for compensation. Indeed, we long ago upheld against similar attack a workmen's compensation scheme providing benefits for injuries not depriving the employee of his ability to work. See New York Central R. Co. v. Bianc, 250 U.S. 596, 40 S.Ct. 44, 63

L.Ed. 1161 (1919); cf. Urie v. Thompson, 337 U.S. 163, 181-187, 69 S.Ct. 1018, 1030-1033, 93 L.Ed. 1282 (1949).

428 U.S. at 21. The Court further observed that the use by Congress of the term "irrebuttable presumption of total disability" to describe a class of claimants which might conceivably include individuals employable outside the coal industry did not render the statute invalid. The Court reasoned:

> Were the Act phrased simply and directly to provide that operators were bound to provide benefits for all miners clinically demonstrating their affliction with complicated pneumoconiosis arising out of employment in the mines, we think it clear that there could be no due process objection to it. For, as we have already observed, destruction of earning capacity is not the sole legitimate basis for compulsory compensation of employees by their employers. New York Central R. Co. v. Bianc, supra.

428 U.S. at 223.

The Court's reliance upon Bianc is telling. That case involved a New York statute which provided compensation based upon "disfigurement" due to an injury, without the need for the claimant's proving a reduction of earning capacity, and the Court stated:

> Even were the impairment of earning power the sole justification for imposing compulsory payment of workmen's compensation upon the employer in such cases, it would be sufficient answer to the present contention to say that a

> serious disfigurement of the face or head reasonably may be regarded as having direct relation to the injured person's earning power irrespective of its effect upon his mere capacity for work. Under ordinary conditions of life, serious and unnatural disfigurement of the face or head very probably may have a harmful effect on the ability of the injured person to obtain or retain employment.

New York Central R. Co. v. Bianc, 250 U.S. 596, 601-602 (1919). The Court was dealing in Bianc with a "price tag" or "benefit schedule" statute. Such a schedule was once contained in Kentucky's Workers' Compensation Act and some other states still utilize such schedules. A comparative treatise on workers' compensation laws explains benefit schedules as follows:

> The typical schedule provides that, after the injury has become stabilized and its permanent effects can be appraised, benefits described in terms of regular weekly benefits for specified numbers of weeks shall be paid, ranging, for example, from 312 weeks for an arm, 288 for a leg, and 160 for an eye, to 38 for a great toe and 7½ for one phalange of the little finger. These payments are not dependent on actual wage loss. Evidence that the claimant has had actual earnings, or has even been regularly employed at greater earnings than before, is completely immaterial.
>
> . . . . The basic theory [of compensation] remains the same; the only difference is that the effect on the earning capacity is a conclusively

> presumed one, instead of a specifically proved one based on the individual's actual wage-loss experience.

Arthur Larson & Lex K. Larson, The Law of Workmen's Compensation, Vol. 1C §58.11 (1994) (footnotes omitted). Thus, the point of the Court's analysis in Usery was that, notwithstanding Congress' use of the term "total disability," all that it was doing was putting a "price tag," in the manner of a benefit schedule, upon a medical condition which could be, but was not necessarily, disabling.

The Supreme Court of Kentucky, in turn, relied upon Usery when it upheld the irrebuttable presumption of "total disability" contained in Ky. Rev. Stat. §342.732(1)(d) in Kentucky Harlan Coal Company v. Holmes. In many respects section 342.732 as a whole can be seen as a benefit schedule for pneumoconiosis, providing for awards in certain amounts based upon different levels of pulmonary impairment and/or progression of the disease. Thus, although the portion of the statute which was at issue in Holmes described an "irrebuttable presumption that the employee is totally disabled" arising if the employee has established the presence of category 2 pneumoconiosis, the real point was to provide a predetermined amount of compensation, based upon assumptions which probably were valid as to a large number of cases; so the Kentucky Court's declaring that statute to be constitutional was consistent with Usery.

Retraining incentive benefits, however, cannot be justified by this means because they lack any of the rational underpinnings of schedule benefits. With the latter, the goal is to eliminate the need for proof as to the occupational effect of a certain type of injury in order to provide efficient disposition of claims. With retraining incentive benefits, particularly in light of the antidiscrimination provision of KRS 342.197(2), it is conclusively established that there is no effect

at all upon employability or earning power. None of this Court's reasons for sustaining the Federal Act, none of the justifications for benefit schedules and none of the Kentucky court's reasons for finding Ky. Rev. Stat. §342.732(1)(d) constitutional applies to retraining incentive benefits. Even though Usery states that "impairment of health" without reduction of earning power is a legitimate basis for workers' compensation benefits, the awards at issue here are conditioned upon the absence of any such impairment. Indeed, the same legislative history relied upon in Usery and in Holmes establishes that the X-ray classifications which form the basis for retraining incentive benefit awards are not associated with pulmonary impairment. The Kentucky legislature obviously had this in mind when it forbade employers' taking any action at all to affect a worker's employment by reason of such X-ray findings. Rather than being based upon a "presumed" disability or an estimate that might fairly compensate for some loss in many, or even a few cases, retraining incentive benefits are paid when it is irrefutably established that there is no loss at all, either physical or occupational.

The only other means of trying to find a valid basis for the statute is to approach the Kentucky legislature upon its own terms and determine whether the statute is rationally related to retraining coal miners who have simple pneumoconiosis. Leeco will concede that such a purpose, if it actually could be served by the statute, would be one which the legislature could lawfully pursue. There are two problems, however. First, as the Supreme Court of Kentucky came very close to saying in Blankenship and Thornsbury, the legislature could not possibly have held a rational belief that the statute would serve such a purpose. Second, the legislature did not really have such a purpose in mind despite its choice of words. According to the book by Senator O'Daniel, the "retraining incentive benefits" provision of the 1987 amendments was nothing but a "political compromise," presumably to expedite the acquiescence of

groups who otherwise would have opposed those other measures geared toward limiting the availability of total disability awards. H. Edward O'Daniel, Jr., 1987 Kentucky Workers' Compensation Law, 21 (1988). In that light, it appears that the reformers simply bought off resistance to the proposed reforms by creating a new species of benefit which claimants could collect while they continued to work as coal miners.

The further amendments which became effective in 1994 created for working miners an actual retraining benefit and, as to claimants who have ceased to work as coal miners, provided a cash payment which falls into line with the "schedule" theme demonstrated by the other subsections of Ky. Rev. Stat. §342.732. Those amendments also serve, however, to underscore the manner in which the previous version of the statute was completely inconsistent with those goals. Statistics provided by the Workers' Compensation Board, which are mentioned briefly in Thornsbury, show that the number of retraining incentive benefit claim filings increased at an alarming rate throughout the years in which the original version of the statute was in effect. After all, the statute had enabled every coal miner who could obtain the requisite diagnosis to apply for benefits, whereas it formerly had been the case that workers could not lawfully seek workers' compensation benefits unless they actually had sustained some noticeable injury or, with regard to occupational diseases, had discontinued their exposure to the causative substance. The Kentucky court knew when it decided Blankenship in 1991 that the 1987 RIB statute could not possibly serve a legitimate purpose. The statistical data presented four years later in Thornsbury simply confirmed this. Thus, while it is now clear that the statute failed to serve any legitimate purpose, such hindsight is not necessary to invalidate the statute because on its face it clearly had no rational basis.

The Kentucky court apparently chose in the present case

to analyze the challenged provision in connection with the other, valid amendments enacted in 1987. This explains the court's reliance upon Holmes. Having found that the legislative scheme, in general, was suited to a proper legislative goal, the court simply declared the retraining incentive benefits provisions constitutional as part of that package. Further, contrary to the Kentucky court's other apparent rationale, the legislature's creation of a real retraining incentive in 1994 cannot reasonably be considered as proof of what the legislature intended seven years earlier. The current statute's validity has nothing to do with that of its predecessor, except to show what should have been done, if anything was to be done, the first time.

Granted, in 1987 it may have been necessary or expedient to create a new source of cash benefits for working miners in order to win acceptance of limits on the availability on total disability awards. This does not mean that the specific provision challenged here is constitutional. Rather, if that was the only reason for the creation of such benefits, it means exactly the opposite. This Court must consider whether the statute in question itself is rationally related to some legitimate purpose or whether it was simply an arbitrary, legislative act. Clearly, the Court should find that it was the latter. If it had been necessary, as a "political compromise" to expedite passage of the 1987 reforms, that the legislature also pass a statute requiring coal mine operators to buy every employee a new car, certainly the Court would not declare that enactment constitutional simply because it was part of a reform package which was generally valid. This Court should not look at Ky. Rev. Stat. §342.732(1)(a) in conjunction with the other reforms simultaneously enacted and thereby deem the former to be constitutional simply because it was the quid pro quo for the latter. Rather, even though compromise is an essential feature of the legislative process, the "quid" and the "quo" must each pass constitutional muster on its own. Otherwise, a legislature

can pass any arbitrary bill it chooses simply by including it in the negotiations pertaining to some other, valid enactment.

The Constitution does not require the legislature to adopt, in every case, the means best suited to achieving its legitimate goals and courts will not question the wisdom of legislative enactments when that is all that they are called upon to do; but when a statute is so obviously devoid of wisdom, when the means chosen by the legislature clearly are not suited at all to the attainment of the stated goal or any imaginable, legitimate goal, the Court must bring to bear its power to correct the situation. Government action is unconstitutional if it is "arbitrary, . . . or demonstrably irrelevant to the policy the legislature is free to adopt." Nebbia v. New York, 291 U.S. 502, 534 (1934). The statute in this case possesses those attributes in abundance.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the Opinion of the Kentucky Supreme Court.

Respectfully submitted,

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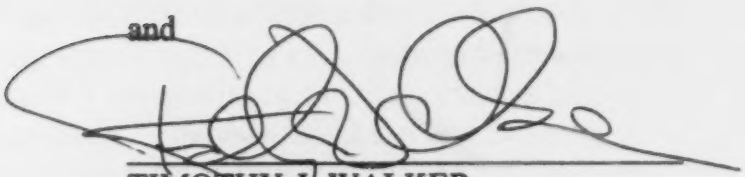

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